SUPREME COURT, U. S.

OCT 15 1974

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioner*

v.

JOSEPH P. MOODY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement of the Case	3
The Proceedings in the District Court and Court of Appeals Prior to the In Banc Rehearing	3
The Convening of the In Banc Rehearing and Its Aftermath	4
The Initial Panel Decision on Back Pay to Which the Court of Appeals Reverted	6
Reasons for Granting the Writ	8
Conclusion	17

Appendix A	1a
Appendix B	26a
Appendix C	58a
Appendix D	59a
Appendix E	60a
Appendix F	61a
Appendix G	65a

CITATIONS

Cases:

Burns v. *United States*, 287 U.S. 216 (1932)	11
Curtis v. *Loether*, — U.S. —, 39 L.Ed. 2d 260, 94 S.Ct. —	9, 16
International Association of Machinists v. *Street*, 367 U.S. 740 (1961)	14

Page

Kober v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973) 15, 16
Langes v. *Green*, 282 U.S. 531 (1931) 11, 15
Larson v. *United States*, 296 F.2d 167 (8th Cir. 1961) .. 11
LeBlanc v. *Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971) 7
Local 189, United Papermakers and Paperworkers, AFL-CIO v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) 13, 14
Moody v. *Albemarle Paper Co.*, — U.S. —, 41 L.Ed. 358, 91 S.Ct. — 2, 6
Newman v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) 7
Phelps Dodge v. *N.L.R.B.*, 313 U.S. 177 (1941) 15
Schaefer v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972) 7
United States v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970) 11
United States v. *Fruehauf*, 365 U.S. 146 11

STATUTES AND RULES:

Title VII, Civil Rights Act of 1964, 42 USC 2000(e) *et seq.* 2
706(a), 42 USC 2000(e)(5)(b) 12
Section 706 (g), 42 USC 2000(e)-5 8
The Equal Employment Opportunity Act of 1972, Public Law 92-961, approved March 24, 1972 10
National Labor Relations Act, As Amended (61 Stat. 136, 73 Stat. 519) 29 USC 151, *et seq.* 13
Rule 41(b), Federal Rules of Appellate Procedure (28 USC) 6

MISCELLANEOUS:

Cong. Rec.—House, p. 1861 (March 8, 1972) 12
110th Cong. Rec. 12381-85 (June 5, 1964) 10
84 Harvard Law Review 1109 (1971) 12
House Resolution No. 1746 12
Legis. Hist., Titles VII and XI of Civil Rights Act of 1964 (EEOC undated) 15
C. Wright, *Federal Courts* 34 (1963) 11

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v.

JOSEPH P. MOODY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Halifax Local No. 25, United Papermakers and Paperworkers, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.*

OPINIONS BELOW

The opinion of the court of appeals entered February 20, 1973 (Appendix (App.) A, *infra,* pp. 1a-25a) is reported at 474 F.2d 134. The opinion and order of the district court, entered November 9, 1971 (App. B, *infra,* pp. 26a-57a), is reported at 4 FEP Cases 561.

JURISDICTION

The judgment of the court of appeals (App. C., *infra,* p. 58a) was entered on February 20, 1973. Petitioner's timely petition for rehearing with suggestion

for rehearing in banc was ultimately denied on July 22, 1974 (App. E, *infra*, p. 60a-61a). The order of the court of appeals (App. D., *infra*, p. 59a-60a), directing that its mandate be stayed for a period not to exceed thirty days, pending the filing of applications to this Court for a writ of certiorari, was entered on September 13, 1974.[1] The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether in construing the remedial provisions of the Civil Rights Act of 1964, the court of appeals has power to order the district court—in this and virtually all other cases henceforth—to award "back pay" as a matter of course to complainants whenever unlawful employment practices are enjoined, despite the Congressional intendment as set forth in § 706(g) of the Act, that the district court in its discretion "may . . . order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

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[1] The highly unconventional course of the antecedent proceedings is detailed in our Statement of the Case (*infra*, p. 3), involving as it does the convening of a rehearing in banc which was aborted after oral argument but prior to the issuance of a decision. In view of the subsequent resolution by this Court of a question of judicial administration critical to the granting of the in banc rehearing, certified pursuant to 28 USC 1254(3) (*Moody* v. *Albemarle Paper Co.*, —*U.S.*—, 41 L.Ed. 358, 91 S. Ct. —), the court of appeals on July 22, 1974 retroactively "denied" the petitions for rehearing and suggestion for rehearing in banc (filed by Petitioner herein and by the employer, Albemarle Paper Company) and "rescinded" its order for the rehearing in banc, which had been entered July 25, 1973 (*infra*, p. 6; App. E, *infra*, pp. 60a-61a).

STATUTES INVOLVED

The pertinent provisions of Sections 701(b), 703(a), 703(c), 703(h), 705(a), 706(a), 706(e), 706(f), 706 (g), 706(k), and 716(a), Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 USC § 2000(e) *et seq.*, are set forth in Appendix F, *infra*, pp. 61a-64a.

STATEMENT OF THE CASE

The Proceedings in the District Court and Court of Appeals Prior to the In Banc Rehearing

In November, 1971, the district court concluded, in a class action suit brought against the Albemarle Paper Company and Halifax Local No. 25, United Paper-makers and Paperworkers, AFL-CIO (the Union, petitioner herein) under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, et seq.), that the seniority system of the Company, at its Roanoke Rapids, North Carolina plant, operated to continue the effects of past discrimination which had not been eradicated, and ordered it restructured, with the substitution of plant for job seniority. The district court denied the plaintiffs' request for an award of back pay to the class, on multiple grounds including corrective action taken over the years and prejudice to the employer and union defendants resulting from the belated assertion of a monetary claim nearly five years after institution of the action, reversing an earlier and long-standing disclaimer on the score. (App. B, *infra*, pp. 47a-48a). The trial court also held that the Company had sustained its burden of proving that its pre-employment personnel testing procedures had undergone requisite validation and were job related, hence non-discriminatory.

On appeal of the testing and back pay rulings, a majority of the court below, on February 20, 1973, re-

versed the district court on both issues. Designated and assigned to the three-judge division which heard the case, were the court's two retired or senior judges, along with Judge Craven, who is in regular and active service. A different senior judge joined Judge Craven to constitute a majority for reversal and remand on each ground of appeal—and, correspondingly, a different senior judge dissented on each of the two issues.[2] With respect to the question of back pay, separate opinions were filed by each of the three judges—opinions that differed demonstrably on the principles of law and statutory construction that should govern review of the exercise of discretion vested in the trial judge under the statute. (App. A, *infra,* pp. 10a-13a, 14a-21a, 24a-25a).

The Convening of the In Banc Rehearing and Its Aftermath

The Union, on March 6, 1973, filed a petition for rehearing with suggestion for rehearing in banc, solely on the back pay issue, as did the Company, but with respect to both the back pay and job testing issues.[3] The Union contended in its petition that the majority opinions on the back pay question introduced entirely novel concepts in judicial interpretation and enforcement of the relevant statutory provisions, with a resultant holding that marked a wide departure from the settled principles theretofore endorsed by the court below and

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[2] Thus (1) on the testing procedures issue, Judge Craven and Senior Judge Boreman were in the majority, with Senior Judge Bryan dissenting, while (2) on the back pay issue, Judge Craven and Senior Judge Bryan formed the majority, with Senior Judge Boreman dissenting.

[3] The Union took no part in the argument on the testing issue, a management prerogative outside the scope of conventional collective bargaining.

the other circuit courts of appeals. The Union urged further that the majority opinions, for all practical purposes, precluded the trial court, in this and all other such potential suits generated at the district court level, from exercising any degree of discretion on the remedial issue of back pay awards, and—contrary to the statutory concept—placed back pay on a mandatory basis.

On June 25, 1973, the court below entered an order granting the petitions for rehearing in banc, with the statement that "a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original panel, have voted to grant the petitions." Following the filing of supplemental briefs, all parties participated in oral argument at the in banc rehearing convened on October 2, 1973, with the bench composed of the seven active and two senior judges of the court below. However, a decision was never issued, notwithstanding a "tentative vote" to "modify the panel decision with respect to an award of back pay" (App. G, *infra,* p. 66a).

Called into question was the eligibility of the two senior judges—who sat on the original division by designation—to vote in the threshold determination of whether the case should be reheard in banc, since both "voted for it", while "a majority of the judges in active service did not"; the affirmative votes of the two senior judges proved "crucial" to "providing a majority of the counted votes in favor of rehearing in banc" (App. G, *infra,* pp. 66a, 67a.).[4] This Court held,

[4] It was the "custom of the court below" to count the votes of senior circuit judges who were members of the initial hearing panel "when the court was polled on the question of *en banc* rehearing, . . . since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted" (App. G, *infra,* p. 67a).

the question having been submitted in the interim by certificate of the court below pursuant to 28 USC § 1254(3), that "senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc". *Moody* v. *Albemarle Paper Co.*, — U.S. —, 41 L.Ed. 358, 360, 94 S.Ct. — (June 17, 1974).

The court below, by order of July 22, 1974, declared that, in view of this Court's decision, its order entered a year earlier "setting this case for rehearing in banc" was currently "rescinded" as "improvidently entered", and the initial "petitions for rehearing and rehearing in banc" were "denied" (App. E, *infra*, pp. 60a-61a). Thus the initial decision and judgment of the three-judge panel were reinstated.[5]

The Initial Panel Decision on Back Pay To Which the Court of Appeals Reverted

A divided court of appeals, reversing the district court's discretionary refusal to award back pay, held that "a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act, should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (App. A, *infra*, p. 13a; footnote omitted). Illustrative of the caliber of "special circumstances the majority would require "to justify refusal of a back pay award", is the example cited, wherein an employer

[5] Upon motions filed by both the Company and the Union, the court of appeals recalled its judgment (issued in lieu of mandate) and granted a stay of mandate not to exceed thirty days from September 13, 1974, pending the filing of petitions for a writ of certiorari (App. D, *infra*, p. 59a). *Cf.*, Federal Rules of Appellate Procedure 28 USC Rule 41(b).

pleaded the necessity of complying with state protective legislation, limiting the hours of work for female drivers, as a defense against charges of employment discrimination.[6] This back pay doctrine—announced for the first time and declared binding upon the district courts—was premised in essential part on the view that "a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorneys' fees under Title II of the Civil Rights Act"; thus, either "are to be awarded as of course in the absence of 'special circumstances' " (App. A, *infra,* p. 13a).

"Strenuous objections" to the foregoing rationale were raised by the dissenting judge, who pointed to "the fallacy" of equating the granting of attorneys' fees under Title II of the Civil Rights Act of 1964 [in accordance with *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968)], with back pay under Title VII of the Act (App. A, *infra,* p. 14a). In concluding that "the award of back pay, unlike the grant of attorneys' fees, is an element of affirmative relief which has been entrusted to the more general discretion of the district courts", the dissenting opinion emphasized the significance of two factors: (1) that "the congressional separation of these two provisions indicated an intent to treat them independently"; and (2) that while back pay is among "the equitable remedies which the district court may use in fashioning relief", there is no evi-

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[6] A factor that was held exculpatory until the statute relied upon was declared invalid. (App. A, *infra,* p. 13a, footnote 5). "*Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir., June 20, 1972; *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 610-11 (E.D. La. 1971), aff'd per curiam, 460 F.2d 1228 (5th Cir., 1972)". The *LeBlanc* case, *supra,* presented a closely analogous situation.

dence of "congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies" (App. A, *infra*, p. 15a; footnote omitted).

The dissenting opinion further stressed the impropriety of overriding the "equitable balancing power" vested by statute in the district court, which is charged "with the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case"—a function "properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal" (App. A, *infra*, pp. 17a-18a; footnote omitted).

REASONS FOR GRANTING THE WRIT

1. This case presents a novel and important question of federal law which has not been but should be decided by this Court. The issue was resolved by the court below incompatibly with settled principles of appellate review as well as the time-honored prohibition against the substitution of judicial for legislative judgment in statutory construction, and hence warrants immediate consideration by this Court.

The majority opinions, requiring that "back pay ordinarily be awarded" if an injunction issues, for all practical purposes preclude the trial court, in this and future cases, from exercising any degree of discretion on the remedial aspect of back pay awards, in deciding cases under Title VII of the Civil Rights Act of 1964 (the Act). This approach is in the teeth of the now familiar phraseology (of Section 706(g))[7] providing

[7] 42 USC § 2000(e)-5 (App. F, *infra*, p. 64a).

that the "court *may* enjoin the respondent from engaging in such unlawful practice, and order such affirmative relief as *may* be appropriate, which *may* include reinstatement or hiring of employees, with or without back pay . . .". (Underscoring supplied.) Indeed, over the course of almost a decade in the operation of the Act, as this Court has observed, in "Title VII cases . . . the courts have relied on the fact that the decision whether to award back pay is committed to the decision of the trial judge". *Curtis* v. *Loether*, — U.S. —, 39 L.Ed. 2d 260, 268, 94 S.Ct. —.

The decision below thus marks a definitive breach of that judicial precedent, and is of manifest general and public importance. If the broad edict of the court below remains undisturbed, it will predetermine all present and potential suits involving this issue that may be generated at the district court level within the aegis of the Fourth Circuit, with far-reaching consequences for both the labor force and management side in the industrial sector of our economy, to say nothing of the effective enforcement of the Act itself.

The legislative history of Title VII of the Act leaves no doubt that the approach reflected in the decision below is contrary to the intent of Congress on this score. The power to order appropriate affirmative action, as finally embodied in Section 706(g) of the Act, was deliberately placed on a discretionary basis, with the responsibility for the exercise of that discretion lodged with the Federal district court bench. While the original version of the bill in the House of Representatives, provided for mandatory affirmative relief (H.R. 7152), the provision in question was reversed in the Senate

(Amendment No. 656). As Senator Dirksen explained:[8]

> "The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of violation, has been revised to read '*may* . . . order such affirmative action as may be appropriate, which *may* include reinstatement and back pay' ". (Emphasis added.)

Some seven years after enactment, the original pattern of Section 706(g) was etched even more sharply by the Congress in the 1972 Amendments.[9] Added to its "affirmative action" feature, (*viz.*, "and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay") was the further permissive clause —"or any other equitable relief as the court deems appropriate", thus strengthening the discretionary hand of the district court to tailor its decree to the requirements of the particular case.

Nevertheless, the court below, almost a year later, moved in the opposite direction to announce an inflexible position which the Congress had considered and rejected both in 1972, and earlier in 1964. In so doing, the majority opinion seriously overreached the "function of the court of appeals" which "is to review the relief the district court grants in the light of the findings and supporting record and to determine if there

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[8] 110th Cong. Rec. 12381-85 (June 5, 1964).

[9] The Equal Employment Opportunity Act of 1972, Public Law 92-961, approved March 24, 1972.

has been an abuse of discretion",[10] but not to "substitute its discretion for that of the district court".[11]

The decision below works mischief in the law on still another ground. To the extent that the mandatory back pay holding below promulgates a hard and fast rule which the subordinate district courts must follow in the future to forestall reversal, it compromises the prohibition implicit in Article III of the Constitution against federal courts passing on claims not ripe for determination.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, *Federal Courts* 34 (1963). As this Court stated in *United States* v. *Fruehauf*, 365 U.S. 146, 157, "such advance expressions of legal judgment upon issues which remain unfocused" are inappropriate because they "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *."

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[10] *United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir., 1970).

[11] *Larson* v. *United States*, 296 F.2d 167, 170 (8th Cir. 1961).

As this Court pointed out long ago in *Langes* v. *Green*, 282 U.S. 531, 541 (1931):

> "The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Accord: *Burns v. United States*, 287 U.S. 216, 222-223 (1932).

The adverse effects, in the field covered by this reform legislation, of improperly expanding the role of the court of appeals while severely constricting that of the district court, contrary to Congressional design, are manifold.

In enacting Title VII and making it mandatory that the Equal Employment Opportunity Commission "*shall* endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation and persuasion" (42 USC 2000e(5)(b), italics added), Congress established a statutory scheme which seeks to utilize these techniques to the full in remedying employment discrimination.[12] The court decisions have uniformly implemented this legislative objective, and the 1972 Amendments to Title VII, carry forward a renewed faith by the Congress in the efficacy of this approach.[13] However, by virtually guaranteeing complainants under the Act, an award of back

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[12] As one student of the legislative history stated:

> "Congress apparently decided that the objectives of the Act could be better served by giving the informal measures of conciliation and persuasion a chance to work . . . . The conciliation process has several features which recommend it: it may solve problems without the animosities created by coercion; it gives the respondent a change to explain and possibly justify his conduct before litigation receives widespread public attention; it is less expensive and time consuming than litigation; and broad relief is available . . ." 84 Harvard Law Review 1109, 1199-1200 (1971).

[13] In introducing the conference report of House Resolution No. 1746, Representative Perkins stated:

> "Conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in federal district court to seek enforcement." Cong. Rec.—House, p. 1861 (March 8, 1972).

pay or differential pay if discrimination is judicially determined under whatever circumstances, the majority opinion would place an undue premium on litigation, however protracted, in derogation of the conciliation feature of the Act. No one is well served by this result, least of all those whom the Act is primarily designed to protect.

Another important consequence is the peril which labor organizations now face—whether locals like Petitioner herein, with only meager resources, or international unions—in the prospect of meeting formidable or enormous assessments by way of back pay liability, to say nothing of defraying plaintiffs' attorneys' fees as well, that threaten to strip their funds to the point of bankruptcy. Typically, union liability, as here rests on the judicially developed theory that it was a party to a collective bargaining contract which, through its seniority system, carried over the effects of past (pre-Act) discrimination.[14] Nothing in the legislative history of the Act suggests that Congress, or indeed the leadership of the AFL-CIO which was in the forefront of those advocating the enactment of anti-discrimination legislation, envisaged this development, imposing, as it does, a tension and conflict between two national labor policies, embodied in landmark legislation. The one, set forth in the National Labor Relations Act,[15] was to promote collective bargaining procedures through freely chosen representatives, with the necessary costs of performing these traditional union functions spread

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[14] *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[15] National Labor Relations Act, As Amended (61 Stat. 136, 73 Stat. 519) 29 USC 151 *et seq.*

among all the employees who benefit.[16] The other, incorporated in Title VII of the Act, established a new category of unfair employment practices covering racial and other working minorities, in effect, supplementing the unfair labor practices defined by the National Labor Relations Act some three decades earlier.

In the case at bar and numerous others that run parallel in the industrial sector, the plaintiffs pursuing the class action are likewise active and supportive members of the union, which is joined as a co-defendant along with the employer, and hence likewise a target, of late, for back pay claims by the affected class.[17] Thus court orders directed against a union for monetary liability, may benefit a member of the plaintiff class at first blush, but at the same time work to his detriment as a member of the union who pays dues—the sole source of union revenue—and depends upon union bargaining skills and services.

The difficulty is an obvious one, if, as may be the case, the monetary order in question is of such proportions as to threaten the union with financial ruin. That is why the decision below should not be permitted to negate the legislative wisdom, which left the district court free to fashion a remedial order according "to what is right and equitable under the circumstances

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[16] *Cf., International Association of Machinists* v. *Street,* 367 U.S. 740, 755, 760-761.

[17] In the first five or six years after the effective date of the Act, when litigation focused upon the question of restructuring seniority rights and the substantive obligations of employers, the Department of Justice did not request back pay in its so-called "pattern and practice suits" filed under the Act. E.g.: *Local 189, United Papermakers and Paperworkers* v. *United States, supra.*

and the law". *Lagnes* v. *Green, supra,* 282 U.S. at 541. Here, as under the National Labor Relations Act from which the back pay concept was derived,[18] this Court's view appears equally pertinent (*Phelps Dodge* v. *N.L.R.B.,* 313 U.S. 177 (1941)):

> "Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." (313 U.S. at 198.)

2. There is a bluntly stated conflict between the decision of the United States Court of Appeals for the Third Circuit in *Kober* v. *Westinghouse Electric Corp.,* 480 F.2d 240 (3rd Cir. 1973) and the decision below. Sustaining the district court's conclusion that "the award of back pay was discretionary and . . . inappropriate in the circumstances of this case," a unanimous Third Circuit took direct issue with the majority opinion below, adopting instead the "more persuasive reasoning" of "the dissenting opinion of Judge Boreman." The court of appeals in *Kober* reaffirmed the traditional judicial test:

> "The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court, to

[18] See, e.g.: *Legis. Hist. Titles VII and XI of Civil Rights Act of 1964,* at 3015, 3039, 3041 (EEOC undated).

> be exercised in the light of all the circumstances of each case."

(480 F.2d at 246-247).

More importantly, the disarray into which the decision below casts the question at issue by its abrupt departure from long-standing judicial precedent, including the earlier contrary decisions of the Fourth Circuit, calls for an exercise of this Court's power of supervision. As this Court recognized in *Curtis* v. *Loether, supra,* the cases are legion in which the courts have subscribed to the standard of review restated in *Kober* v. *Westinghouse Electric Corp., supra.*

The schism within the Fourth Circuit itself is highlighted by the initial grant of an in banc rehearing, which, while aborted prior to final decision for extraneous reasons concerning appellate procedure, nonetheless produced a "tentative vote to "modify the panel decision with respect to an award of back pay" (*supra,* p. 5). While the circumstances are extraordinary, with the in banc rehearing nullified, they afford a revealing insight into the different schools of thought on this issue still extant in the circuit below.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 13, 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, and ARTHUR MITCHELL, *Appellants,*

versus

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge.

(Argued October 3, 1972 Decided February 20, 1973).

Before BOREMAN and BRYAN, Senior Circuit Judges, and CRAVEN, Circuit Judge.

George Cooper and Robert Belton (J. LeVonne Chambers; Chambers, Stein, Ferguson and Lanning; T. T. Clayton; Clayton and Ballance, Conrad O. Pearson, Jack Greenberg,

William L. Robinson, Morris J. Baller, Eric C. Schnapper, on brief) for Appellants; Leonard Appell (Warren Woods, Betty Southard Murphy, Wilson, Woods and Villalon, and James B. Ledford, on brief) for Appellee, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO; Francis V. Lowden, Jr., (Paul M. Thompson, Hunton, Williams, Gay and Gibson, Gordon G. Busdicker, Faegre and Benson, Julian R. Allsbrook, Jr., Allsbrook, Benton, Knott, Allsbrook and Cranford, Charles F. Blanchard, and Yarborough, Blanchard, Tucker and Denson, on brief) for Appellees, Albemarle Paper Company, et al; Martin Slate, Attorney, Equal Employment Opportunity Commission, (John De J. Pemberton, Jr., Acting General Counsel, Julia P. Cooper, Chief, Appellate Section, Equal Employment Opportunity Commission, on brief) for Amicus Curiae, Equal Employment Opportunity Commission.

CRAVEN, Circuit Judge:

This is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq. Plaintiffs are representative members of the class composed of all Negroes employed at defendant's Roanoke Rapids plant and all Negroes who may hereafter apply for employment at the Roanoke Rapids plant. The multitude of defendants is occasioned by changes in corporate ownership which occurred subsequent to the institution of the action. Since the Roanoke Rapids operation has at all pertinent times been called the Albemarle Paper Company, the corporate defendants will hereinafter be referred to as Albemarle.

The district court found that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965, and that the effect of that discrimination had been perpetuated through a job seniority system. Thus, the district court enjoined Albemarle and the defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against Negro employees,

and ordered that the job seniority system be abolished and a plant-wide seniority system be implemented. There has been no appeal from these provisions of the court's decree.

The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.

The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay.

I

Testing Procedures

Prior to 1958, no employment personnel tests were given to applicants for employment at Albemarle. In 1956, the personnel manager was requested to design a screening program for selection of employees for certain departments. In this connection, the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension were selected to test applicants. A brief study was made at that time to determine the usefulness of the Beta test.

About 1963, the then personnel manager discontinued using the Bennett Mechanical Test since it had not been studied. Use of the Wonderlic Test, A and B series, was initiated at that time. Whereas the Beta is a non-verbal test developed to measure the intelligence of illiterate and non-English speaking individuals, the Wonderlic Tests are

verbal tests of general mental ability. Use of the Wonderlic Tests was adopted in connection with the Beta because Albemarle felt it essential for new employees to have a certain level of verbal facility because of the increasing technical nature of the operation and the increasing use of printed instructions in the operation of machinery and the like.

The operations of Albemarle are, like other pulp and paper mills, organized on a departmental basis. For purposes of employee classification and promotion, each department is organized into one or more lines of progression. Entrance into each department is effected at the bottom of a line of progression and employees move up, depending on their ability and experience, as vacancies occur. In all, Albemarle has 11 separate departments containing 17 lines of progression. Since 1963, applicants for 8 of these departments and 14 of the lines of progression were required to score successfully on the Beta and Wonderlic pre-employment tests.

After the Supreme Court decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), Albemarle hired an expert in industrial psychology and testing to conduct a validation study of its pre-employment testing procedures. A validation study determines whether test results have a significant relationship to actual performance on the job. The technique adopted for the validation study of Albemarle's tests was concurrent validation. In concurrent validation, a sample of current employees occupying the jobs, or job groups, in question is selected. These employees are then given the tests, and the test scores compared with one or more criteria of the employees' ability to perform their jobs.

Albemarle's validation study covered 10 job groups in only 8 of the 14 lines of progression, and 5 of the 8 departments for which the tests are required. The sample of

employees was generally selected from the higher level jobs and encompassed approximately 30 percent of the different jobs for which tests are required. The test scores from that sample were compared with two supervisors' comparative ratings of employees in each job slot. The criteria for the supervisors' rating was: "Excluding a man's attitude, just how well the guy can do the job when he's feeling right." (A.471). No job analysis was done for the jobs in question.

Albemarle's expert found that one of the tests was validated for 9 of the 10 job groups studied. However, both tests were valid for only one job group.

The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error.

Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in action." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). In an employment practice, though facially neutral as the testing procedures here, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity. *Griggs*, at 432. The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact.[1] It was thus incumbent upon

[1] It was demonstrated in plaintiff's exhibits that on the Wonderlic Series 96 percent of whites passed as opposed to 64 percent of blacks. This corresponds with the national average as determined in a study by the authors of the test. Negro Norms, A Study of 38,452 Job Applicants for Affirmative Action Programs, E. F. Wonderlic & Assoc., Inc. (1970).

Albemarle to establish business necessity[2] by showing that its testing requirements "have a manifest relationship to the employment in question." *Griggs*, at 432. *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 455-57 (5th Cir. 1971).

While § 703(a)(2), (h)[3] specifically authorizes professionally developed tests not used to discriminate, *Griggs* makes clear that that section allows only those tests proven to be job related. 401 U.S. at 436. In so holding, the Court gave great deference to the interpretation of the Act evinced in a set of guidelines by the enforcing agency, the Equal Employment Opportunity Commission. *Griggs*, at 433-34. We have also recently noted with approval these guidelines. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 n. 7 (4th Cir. 1971).

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[2] "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential impact."

Robinson v. Lorillard Corp., 444 F.2d 791, 978 (4th Cir. (1971). *See also*, Note, *Employment Testing: The Aftermath of Griggs* v. *Duke Power Company*, 72 Colum. L. Rev. 900, 908 (1972).

[3] § 703(a)(2)(h) provides in relevant part:

> "Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

42 U.S.C.A. § 2000e-2(h).

We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, and have been validated in accordance with EEOC guidelines.

In developing criteria of job performance by which to ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective ratings of supervisors who were given a vague standard by which to judge job performance. Other courts have expressed skepticism about the value of such ill-defined supervisor appraisals. *See, e.g., Rowe* v. *General Motors Corp.*, 457 F.2d 348, 452 (5th Cir. 1972). Also Cooper and Sobol have stated in their article, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1662 (1969):

> Supervisory ratings, for example, which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors.

Likewise, in this regard the EEOC guidelines provide:

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis.
>
> (4) In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques

> should be carefully developed, and the ratings should be closely examined for evidence of bias.
>
> . . .
>
> 29 C.F.R. § 1607.5(b) (1970).

We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See, Western Addition Community Organization* v. *Alioto*, 340 F.Supp. 1351, 1354-55 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act.

Even if the validation procedures had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study. In this case the tests were approved as a requirement for 6 lines of progression for which the tests had not been validated. While it is true that a test need not always be validated for each job for which it is required, there are narrow limits on when a test may be used without validation. The EEOC guidelines provide:

> (2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. 29 C.F.R. § 1607.4(c) (1970).

In this case, a failure to perform job analyses in the lines of progression involved in the validation study and in the other lines of progression for which the tests are required prevents concluding that no significant differences exist in the jobs in question.[4]

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[4] The appellants also question the validity of the validation study because the employees tested were primarily from higher level, rather than entry level, positions. As pointed out by the EEOC guidelines, 29 C.F.R. § 1607.4(c)(1) (1970), such a validation

Not only was it error to approve the testing procedures for lines of progression not validated, but it was also error to approve requiring applicants to pass two tests for positions where only one test was validated. Albemarle seeks to justify this under the business necessity rule. Albemarle originally hires all employees into a pool. From this pool the employees move into a line of progression as vacancies occur. Since it is not known into which line of progression an employee will be placed, Albemarle asserts there is nothing wrong with requiring all employees to be qualified for any line.

Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

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technique is permissible only where new employees will progress to the higher level "within a reasonable time and in a great majority of cases." As stated by Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1649 (1969):

> In addition, the problems inherent in test use are compounded by the fact that the higher level jobs may not be reached for several years, during which time an employee may improve his capabilities. This possibility seems particularly likely in the case of an individual whose potential has been artificially suppressed through discrimination, in education and otherwise. In order for a promotability interest to justify test use, therefore, it is essential that the test have been properly evaluated and shown to be predictive of performance at some job level to which promotions can be expected in the reasonable future.

In *Griggs* the Court failed to reach the question of whether a testing procedure which takes into account higher level job requirements is permissible. 401 U.S. at 432. We likewise fail to reach this question because of insufficient evidence below as to the time in which it takes an employee to progress to higher level jobs.

Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use.

II

Back Pay

Title 42 U.S.C. § 2000e-5(g) provides in relevant part:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The district court found that Albemarle had practiced discriminatory employment practices and that these practices had been perpetuated through a job seniority system. Consequently, the district court enjoined Albemarle and the defendant union, Halifax Local 425, from continuing the discriminatory practices. Nevertheless, the district court, finding an award of back pay to be within his discretion, refused to award back pay to the complaining class. The reasons given by the district court for refusing such an award were that the claim for back pay was filed nearly five years after the institution of the action, and that there was no evidence of bad faith noncompliance with the Act. Neither of these is sufficient to justify the district court's refusal to award back pay.

In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), a case which also dealt with a seniority system which perpetuated past discriminatory practices, the defendants made the contentions presented to us here.

> The complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay . . . . At a pretrial hearing concerning the appropriateness of a class action, one of the lawyers for the plaintiffs clearly indicated that the suit was one for

> injunctive relief rather than recovery of lost wages. It was not until well after trial of the case, though before the judge had entered a decision, that a request was made for additional relief in the form of back pay for the class.

444 F.2d at 802-03. In *Robinson*, as here:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief . . . . The defendants have in no way been prejudiced by the belated claim.

444 F.2d at 803.

Other courts have held likewise. The Fifth Circuit held, in *United States* v. *Hayes Int'l Corp.*, 456 F.2d 112 (1972), that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation.

Also, the Seventh Circuit, in a case which was not a class action, remanded the case in order that " 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the suit.' " *Sprogis* v. *United States Air Lines, Inc.*, 444 F.2d 1194, 1202 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

In *Robinson* the argument was also made that back pay should not be awarded where the defendant had acted in good faith. Put negatively, the argument, urged by Albemarle, is

> that back pay should not be awarded in the absence of a specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation

> for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition.

444 F.2d at 804. *See also, Johnson* v. *Goodyear Tire & Rubber Co.*, — F. Supp. —, 5 FEP Cases 32 (S.D. Tex., August 10, 1972) (also a seniority case where good faith was present).

The only significant difference between *Robinson* and the present case is that in *Robinson* the district court had awarded back pay and the district below refused to award back pay. The question then is whether, in light of the broad aims of Title VII, this court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge.

"Discretion in a legal sense necessarily is the responsible exercise of official conscience on all of a particular situation in the light of the *purpose for which the power exists.*" *Bowles* v. *Goebel,* 151 F.2d 671, 674 (8th Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 331 (1944). Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. *Wirtz* v. *B. B. Saxon Co.,* 365 F.2d 457 (5th Cir. 1966); *Schultz* v. *Parke,* 413 F.2d 1364 (5th Cir. 1969).

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 720 (7th Cir. 1969). In light of the congressional purpose, courts should give "a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities." *Rowe* v.

General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).

Also, as we stated in Robinson, "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." 444 F.2d at 802. See also, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. *See Bowe, supra*, at 719. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.[5] *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). *See Bowe, supra* at 719-20.

Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered. *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

REVERSED

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[5] For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 610-11 (E.D. La. 1971), *aff'd, per curiam*, 460 F.2d 1228 (5th Cir. 1972).

BOREMAN, Senior Circuit Judge, concurring in part and dissenting in part:

I am in agreement with the result reached by Judge Craven in that portion of his opinion which holds that Albemarle Paper Company has failed to show a business relationship between the racially biased tests administered to prospective employees, and its personnel requirements. However, from that portion of his opinion reversing the district court's refusal to award back pay, I must respectfully dissent.

The appellants advance multiple theories in their effort to persuade this court to modify the relief granted below to include an award of back pay. The two arguments approved and adopted by Judge Craven are: first, the equation of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), with § 706(k) of the Act, 42 U.S.C. § 2000e-5(k), which provides for an award of attorney's fees in the discretion of the court and under which the federal courts have held attorney's fees are to be awarded as of course,[1] in the absence of "special circumstances;" and second, that failure to grant back pay was an abuse of discretion under *Robinson* v. *Lorillard,* 444 F.2d 791 (4 Cir. 1971).

In *Lea* v. *Cone Mills,* 438 F.2d 86, 88 (4 Cir. 1971), this court, over my strenuous objections stated in dissent, extended the holding of the Supreme Court in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402-403 (1968), that attorney's fees should ordinarily be granted in suits under Title II of the Act,[2] to include suits under Title VII as well. A study of the relevant sections and the reasoning behind the *Newman* and *Lea* decisions reveals the fallacy of a comparison between to provision for attorney's fees and for back pay.

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[1] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971).

[2] *Accord,* Wooten v. Moore, 400 F.2d 239, 242 (4 Cir. 1968).

The pertinent provisions with respect to the allowance of attorney's fees under Title II and Title VII are virtually identical, and each was considered by Congress as sufficiently significant to be expressed in an individual subsection.[3] However, the grant of authority to award back pay is found in a completely different subsection of Title VII, the congressional separation of these two provisions indicating an intent to treat them independently. Furthermore, the subsection in which the provision for back pay is found generally sets out the equitable remedies which the district court may utilize in fashioning relief should the complaining party prevail, indicating no congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies.[4]

More significant, however, is the reason for which the district courts' discretion was found to be limited with respect to the award of attorney's fees to prevailing parties plaintiff. In bringing an action against an employer (or manager of a public accommodation under Title II) for discrimination in the operation of his business, the plaintiff is more than a private party litigant; he acts as a "private attorney-general" in vindicating the interests of

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[3] Title II, 42 U.S.C. § 2000a-3(b):

> (b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Title VII, 42 U.S.C. § 2000e-5(k):

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[4] The authorities generally deal with injunctive relief as within the discretion of the district courts. *E.g.* Sprogis v. United Air Lines, 444 F.2d 1194, 1202 (7 Cir. 1971).

the public, and it is this advancement of the commonweal that is the basis for allowing attorney's fees as of course.[5] Such a public purpose is not present in the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case, and the monetary award is intended to redress purely private inequities.[6]

I must conclude, therefore, that the award of back pay, unlike the grant of attorney's fees, is an element of affirmative relief which has been entrusted to the more general discretion of the district courts.[7]

Judge Craven's opinion also apparently adopts the view that this court's decision in *Robinson* v. *Lorillard, supra,* stands for the proposition that under facts similar to those in *Robinson,* it would be an abuse of the district court's discretion to deny a request for back pay. Such a construction misinterprets the holding in *Robinson* and the proper scope of appellate review of discretionary decisions. The burden of persuasion falls on the party attempting to show an abuse of discretion and not on the successful party below.[8] In *Robinson* the holding of this court was that the appellant company failed to show, under the factual situation before the district court, that it was an abuse of

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[5] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5 Cir. 1968). *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV.L.REV. 1109, 1254 (1971).

[6] *See,* Austin v. Reynolds Metals, 327 F. Supp. 1145, 1153 (E.D. Va. 1970).

[7] *E.g.,* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9 Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970); Johnson v. Georgia Highway Express, 417 F.2d 1122 1125 (5 Cir. 1969). *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV.L.REV. 1109, 1265 (1971).

[8] LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972).

discretion *to award* back pay, not that back pay was mandated under those circumstances. The term "discretion"[9] denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal.[10]

> "'*We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court.*'" (Emphasis supplied by *Larson.*) *Larson* v. *United States,* 296 F.2d 167, 170 (8 Cir. 1961).

The first reason assigned by the district court for its refusal to award back pay—that there was no evidence of bad faith noncompliance with the Act as evidenced by the active recruitment of Negroes into the company's training program for certain skilled lines of progression as early as 1964, the company-initiated merger of some lines of progression to increase advancement opportunities and

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[9] The Supreme Court has defined "discretion" as follows:

> The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541 (1931).

[10] United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970):

> The government has urged us to remand with directions to enter specific injunctive relief. After careful consideration we have concluded to deny this request. The fashioning of effective and appropriate injunctive relief depends in part on the discretion of the district court. The function of the courts of appeal is to review the relief which the district court grants in light of findings and the supporting record and to determine if there has been an abuse of disretion.

good faith attempts to validate its testing procedures—[11] is not sufficiently compelling, in and of itself, to support a denial of back pay. In *Robinson* this court made clear that the remedy of back pay is not in the nature of a punishment but is an equitable measure to restore those discriminated against to their proper economic position had the complained of actions not occurred.[12] This is not to say, however, that the good faith of the company may never be taken into account in considering and determing the proper relief to be granted.[13] Should there exist equitable factors of which the district court may properly take cognizance, and which are supportive of a decision to deny back pay, then innocence and good faith efforts on the part of the employer may be factors to be weighed in the balancing of equities.

Some insight into the proper application of that equitable balancing power may be gained from an examination of the third argument advanced by the appellants, a comparison of § 706(g) with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). In the case of *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177 (1941), which was decided under § 10(c), the Labor Board had ordered reinstatement of a discriminatorily discharged employee together with a full award of back pay, although the employee had not earned wages during the period of his lay-off. In remanding to the Board for modification in light of the principle of mitigation of damages, the Supreme Court stated:

> [T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a

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[11] In 1963 the company discontinued the use of the Bennett Mechanical Comprehension Test, which is regarded to be racially biased (See Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV.L.REV. 1598, 1641 n. 16 (1969)) in favor of Wonderlic A & B tests.

[12] 444 F.2d 791 at 802, 804.

[13] *See*, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006-7 (9 Cir. 1972).

> civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. (313 U.S. at 198.)

The primary factor given by the district court in the instant case was prejudice to the interests of the company arising from representations made by the appellants in their status as plaintiffs below. During the early stages of this case, the company moved for Summary Judgment and in replying to that motion,[14] the plaintiffs set out the limits of the relief sought:

> It is important to understand the exact nature of the class relief sought by plaintiffs. No money damages are sought for any member of the class not before the court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future....
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> ....
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> [T]he matter of specific individual relief for other class members is not before this Court.

Judge Craven in the majority opinion erroneously characterizes the prayer for back pay as merely a tardy request, when as illustrated above, it in fact was a reversal of express representations made three and one-half years

[14] The answer was filed on November 22, 1966.

prior to the request for additional relief.[15] This situation is plainly distinguishable from *Robinson*, in which the oral representation by counsel for the plaintiffs that no monetary relief was sought was made at pre-trial conference. The prejudice to Albemarle stemmed not from a failure of defenses, with which this court was concerned in *Robinson*, but from the unconscionably long delay between the express disclaimer and the unindicated, abrupt reversal of position.

Rule 54(c), Federal Rules of Civil Procedure, provides that the federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party in whose favor it is rendered has not demanded such relief in his pleadings," but this is not the ordinary case of a mere failure to request a specific form of relief; here there was an express and formal disclaimer of intention to seek that particular remedy. An opposing party should be permitted to rely on such a statement, and to the extent that in relying thereon he has acted to his detriment,[16] Rule 54(c) does not mandate the grant of the contested award.[17]

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[15] The request was first communicated to the company on June 4, 1970.

[16] Illustrations of the detriment arising from the reliance of the defendants upon the express disclaimer by the plaintiffs of their intention to seek back pay for members of the class generally, were argued before the district court at pre-trial conferences: (1) The extensive period of time taken for prosecution of the suit exposed the defendants to the unexpected hazard of a potentially enormous award, unavailable for consideration during their continued efforts to arrive at a settlement, and which threatened the financial viability of the defendant paper mill. (2) During the hiatus with respect to the back pay claim, the paper mill was sold by the defendant Ethyl Corp. to the defendant Hoerner-Waldorf Corp., with the transfer agreement taking express notice of the pendency of suit, a strong indication of the impact the status of that suit had upon the deliberations of the principals. (3) The inordinately long delay tended to preclude the defendants from adequately preparing a defense to individual claims, due to the impossibility or impracticality of deposing witnesses and claimants nearly five years after the occurrences of events of which plaintiffs complain.

[17] Rental Development Corp. v. Lavery, 304 F.2d 839, 842 (9 Cir. 1962).

More importantly, Rule 54(c) is merely the vehicle by which the party is to obtain the "relief to which he is entitled." The relief and the entitlement thereto are to be determined by the district court under § 706(g), and Rule 54(c) cannot compel the grant of relief which is within the discretion of the district court. The court below did not base its refusal to award back pay on the failure to request such relief pursuant to Rule 8(a), F.R.Civ.P., but by virtue of its discretionary powers under § 706(g); the source of the claim of authority for granting the award sought is the very source relied upon by the court below to deny the request.

I do not find it possible to say that the reasons assigned by the district court in support of its decision not to award back pay show an abuse of discretion, and I would therefore affirm the decision below. Under the circumstances here I would not be willing, in any event, to go beyond a direction to the district court to investigate the propriety of awarding back pay with respect to those named plaintiffs actually before the court since the representations of the appellants in their Memorandum in Opposition to Summary Judgment explicitly indicate an intent to seek affirmative, individual monetary relief only for themselves, a relatively small group, and for no others.

* * * * * * * * * *

Purdue University for statistical correlation. The District Judge found:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings...."

The expert advised that "the company utilize these tests for its initial hiring", observing, however, that "no test or set of tests will validate for all jobs." With this evidence in

mind, I look to the errors ascribed in Judge Craven's opinion to the District Court's refusal to direct Albemarle to abolish or change its testing procedures.

I. First, I cannot agree that the employer did not validate the tests and relate them to the jobs in *all* the lines of skilled employment. The District Judge found otherwise, saying: "The group tested was typical of employees in the skilled lines of progression". This, for me, is a conclusion that the groups tested fairly exemplified the remaining groups and also fairly represented the qualifications existing in *all* the skilled lines. This reading of his factual findings is reinforced by his later statement: "The *personnel* tests administered at the plant have undergone validation studies and *have been proven* to be job related". (Accent added) This statement, I understand, encompasses all the groups at the plant, whether tested directly or by sample. Such a method of testing in a multiunit organization is, as noted by Judge Craven, approved by the Guidelines of Employee Selection Procedures, supra, § 1607.5.

The breadth of the expert's survey is described in his report as follows:

> "General Summary:
>
> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests *can be reasonably used for both hiring and promotion for most of the jobs in this mill.*... The EEOC could not reasonably object to these standards in the light [of] the validation data covered in this report." (Accent added.)

Secondly, in view of the findings by the Court that validation studies had been applied to the personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of "job analyses". It seems to me that these findings necessarily recognize that the equivalent of "job

analysis'' was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements.

Thirdly, also unwarranted, it seems to me, is criticism of the District Court's acceptance of the company's practice of ''requiring applicants to pass two tests for positions where only one test was validated''. The two are the Beta and Wonderlic. Beta (non-language) measures merely native intelligence, while Wonderlic (verbal) tests reading ability. The District Court justifies its approval of Albemarle's utilizing, both tests because it was a business necessity. The Court found that the complexity of Albemarle's newly adopted machinery made reading an absolute requirement for the safe and efficient operation of the machines and called for employees ''with a high level of native intelligence''. A personal inspection of the machinery revealed the intricacy to the judge.

Each of these aptitude tests is ''demonstrably a reasonable measure of job performance''. *Griggs*, at 436. Thus they are their own proof of their validation. My understanding is that a test cannot be declared discriminative if it searches for an indispensable factor of a job. *Griggs*, supra, at 431.

It does not appear from the District Judge's finding that low scores on one or both tests would bar all applicants for employment. Decisions on employment in non-technical areas are apparently not made solely upon test results, but include such considerations as experience, references and interviews.

In my judgment the District Judge, in regard to the testing requirements, exercised a cautious solicitude, both for the employees' entitlements and the employer's obligations under the Civil Rights Act of 1964. His injunction against a high school education as a job prerequisite and

against the use of job seniority instead of plant seniority removed the employees' sustainable grievances. Ten days were devoted to the hearing of the case—July 26 to August 5, 1971. With this industry and application, along with the knowledge of the rigors of *Griggs,* as well as of the EEOC guidelines, the District Judge did not, to my mind, omit or deviate in any significant degree from the Act. It must be remembered, throughout, that the three items of the District Judge's determination just enumerated constitute findings of fact, and I cannot say they are clearly erroneous.

II. Lastly, recovery was asked by the plaintiffs for "the amount of pay which would have accrued to the employees had there been no unlawful practice". Under the Act, 42 U.S.C. 2000e-5(g), back pay may be ordered in accompaniment of an injunction—and only then—against an employer who has engaged in "an unlawful employment practice" and has done so "intentionally".

As Judge Craven notes, the District Court found that "Albermarle has practiced racially discriminatory employment . . . prior to July 2, 1965 and that the effect of this discrimination had been perpetuated through a job seniority system". Accordingly the Court issued an injunction, pursuant to the Act, against the maintenance of this discrimination, terming it "an unlawful employment practice" and concluding that it had been committed "intentionally". No objection was made by the employer to this finding and conclusion, and no appeal taken from the injunctive order. Indeed, in the oral argument of the appeal the appellee-defendants conceded that the District Judge had indeed stated this conclusion on "intentionally".

For this reason I think back pay lost by an employee through the company's resort to job-seniority should be recovered. Of course, the reimbursable loss must be proved

to be the direct result of the invidious practice and, as Judge Craven admonishes, the grant of monetary relief is not to exceed the "damages which are actually suffered".

CONCLUSION

In sum, as set forth in Part I hereof, I dissent from Part I of Judge Craven's opinion; but I concur with the award, in his Part II, of back pay insofar as it is granted for loss occasioned by the job seniority practice, as explained in my Part II.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

JOSEPH P. MOODY, ET AL., *Plaintiffs*

v.

ALBEMARLE PAPER COMPANY, A Virginia Corporation, ET AL., *Defendants*

AND

ALBEMARLE PAPER COMPANY, A Delaware Corporation; HOERNER WALDORF CORPORATION, A Delaware Corporation; FIRST ALPACO CORPORATION; and ETHYL CORPORATION, A Virginia Corporation, *Additional Defendants.*

Civil No. 989

Memorandum Opinion and Order

Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., on their own behalf and on behalf of other Negroes similarly situated, alleging violations by their employer and their local union of their rights to equal employment opportunities. Jurisdiction is vested in this court by the Act and by 28 U.S.C. § 1343.

The named plaintiffs are citizens of the United States and of the State of North Carolina, residing in Halifax County, North Carolina. On July 15, 1971, this court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who

may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially-discriminatory employment practices of the defendants.

The alleged discriminatory employment practices have occurred at a pulp and paper plant in Roanoke Rapids, North Carolina. The multitude of defendants is explained by changes in the corporate ownership of the plant which have occurred since the institution of this action more than five years ago. However, the operation at Roanoke Rapids has at all pertinent times been called the Albemarle Paper Company and, therefore, for purposes of discussion, unless clarity otherwise dictates, such operation will be referred to as "Albemarle".

The action encompasses all aspects of the hiring and promotion practices within the Roanoke Rapids facility and the application of the provisions of the collective bargaining agreements entered into by it with the defendant Union. The essential issues relate to the educational and testing requirements for employment and promotion utilized at the plant and the effects of the "job seniority" system embodied in the respective union contracts.

This cause was tried by this court without a jury, and having considered the evidence, briefs, oral arguments and the voluminous five-year accumulation of pleadings and other court papers, the court makes the following

FINDINGS OF FACT

1. On May 9, 1966 the named plaintiffs filed charges against Albemarle, Halifax Local No. 425 and United Papermakers and Paperworkers, AFL-CIO (United Papermakers) before the Equal Employement Opportunity Commission (EEOC) pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a). These charges raised the issues set forth in the complaint filed with this court.

2. Plaintiffs received letters dated July 28, 1966 from EEOC notifying them that they were entitled to file suit in federal district court under Title VII of the Act. The complaint in this action was timely filed on August 25, 1966.

3. The paper mill was built in 1907 and it began business under the name of Halifax Paper Company. In 1937 a Virginia corporation, Albemarle Paper Company, acquired the plant. Albemarle Paper Company (Virginia), a wholly owned subsidiary of the defendant Ethyl Corporation, operated the plant at the time this action was filed. On October 31, 1968, the paper mill was transferred to defendant Albemarle Paper Company, a Delaware corporation. Albemarle Paper Company (Delaware) is a wholly owned subsidiary of defendant Hoerner Waldorf Corporation, a Delaware corporation. Albemarle's (Virginia) name was changed to First Alpaco Corporation and thereafter was merged into defendant Ethyl Corporation.

4. There has been a continuation of the business in substantially the same manner in which the business was operated prior to the transfer on October 31, 1968; the plant location is the same; the work force is substantially the same; the jobs and working conditions are substantially the same; the method of production is substantially the same; the products and services provided are substantially the same; and the machinery and equipment are substantially the same.

5. Albemarle is a leading employer in the Roanoke Rapids area. It pays higher wages than most, if not all, industries in the area.

6. At all pertinent times the Albemarle facility at Roanoke Rapids has been an empoyer in an industry affecting interstate commerce and has more than 100 employees.

7. Defendant Local No. 425 (hereafter referred to as the "Union") is a labor organization which is and has been a party to collective bargaining agreements with Albemarle pertaining to production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees. The Union is a labor organization within the meaning of Section 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(d) and (e).

8. The operations of Albemarle, as is characteristic of pulp and paper mills throughout the United States and Canada, are organized on a departmental basis in accordance with the type of work performed in each department. The jobs within each department generally require skills and ability which differ from one department to another and each department has a specific function of its own in the overall operations of the mill. For purposes of employee classification and promotion, each of the departments is organized into one or more "lines of progression". In all but exceptional circumstances, entrance of new employees into each department is effected at the lowest-paying, least responsible job of the lines of departmental progression and vacancies are filled by promotions within the lines.

9. There are over 100 different jobs at the Roanoke Rapids plant ranging from Janitorial to Complex Machine Operator. Of these, approximately 86 are jobs traditionally reserved for white persons ranging from jobs of Helper and Laborer to Machine Operator.

10. Promotion and demotion within a line of progression is governed by seniority and ability. The 1965 and 1968 labor agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department shall prevail".

11. Thus, the seniority system utilizes "job seniority" for promotions and demotions. This means that the employee who has the greater seniority in the job within the line of progression immediately below the vacancy to be filled would normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority, assuming that the person has the necessary ability, experience and training to do the higher job.

12. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

13. A 1965 labor agreement provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within thirty days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer was effected at the request of the company, his seniority in the department (or line of progression) left would be retained for a period of six months from the date of transfer. An employee transferred would, therefore, enter at the bottom job in the line of progression and would suffer a reduction in pay if that job to which he was permitted to transfer carried a rate of pay less than the job from which he had transferred.

14. This provision was amended by the 1968 labor agreement to read:

"10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

"10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of progression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a "permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not

lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling".

15. Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression. The racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965). As of June 30, 1967, the racial composition of jobs, departments and lines of progression were as follows:

A. *Wood Yard Department*	*Negro*	*White*
YARD CREW		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
Knife Grinder*	0	1

	Negro	*White*
SERVICE CREW		
Dempster-Dumpster	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0
B. *Pulp Mill Department*		
Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10
CE Recovery Operator	0	4
First Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor-Dead End Job	1	0
C. *A Paper Mill Department*		
PAPER MACHINE LINE OF PROGRESSION		
Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tender No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4

	Negro	*White*
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
First Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0
D. *B Paper Mill Department*		
Machine Tender	0	8
Back Tender	0	8
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor-Dead End Job	5	0
Stock Room Operator	0	4
Stock Room First Helper	0	4
Stock Room Second Helper	0	4
E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0

	Negro	*White*
G. *Boiler Department*		
Boiler Operator	0	4
H. Power Plant Department		
Power Plant Operator	0	4
First Helper	0	4
Second Helper	0	4
Utility Man	0	4
I. Technical Service Department		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7
L. *Miscellaneous*		
General Extra Board	2	62
Utility Extra Board	50	0
Truck Drivers	0	4

The "Extra Boards" of Item "L" above were introduced in the early 1950's for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression. The General Extra Board fed the "skilled" lines of progression and the Utility Extra Board fed the "unskilled" lines of progression. Both were manned by new employees and employees who had been laid off of other jobs and were waiting recall.

16. The 1968 labor contract made certain changes in the lines of progression. The chipper operator and crew lines of progression were merged on the basis of rates of pay into one line of progression, as were the chipper operator and line crew lines of progression and the brakeman and beaterman lines of progression. Separate departments were created out of old departments and the "dead end" job of janitor was eliminated. These changes in the lines of progression had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still "locked" in the lower paying job classifications. For example, the line of progression and the black-white racial composition of the reorganized wood yard department were as follows:

Wood Yard Department	*Negro*	*White*
Crane Operator (American)		
Crane Operator (large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chipper Operator No. 2		
Chain Operator	0	4
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborer	12	0

Thus, the blacks occupied the bottom twenty-five job positions within the wood yard department.

17. The General Extra Board and the Utility Extra Board were merged in 1968. Employees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board. The effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs.

18. Prior to 1958 no employment personnel tests were given to applicants at the Roanoke Rapids plant. In about 1956 the personnel manager was requested to design a personnel screening program for use in the selection of new employees to be hired for jobs created by the installation of a new paper machine. In this connection two "paper and pencil" tests — the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension Test — were selected. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have a high school education.

19. In an effort to validate the Beta, the examination was administered to a sample of employees who worked on the No. 3 paper machine, maintenance employees and possibly some employees in the pulp mill. The method that was followed is known by industrial psychologists as concurrent validation, that is, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, a cutoff score of 100 was established for the Beta. No blacks were known to be included in the validation sample.

20. Use of the Bennett Mechanical Test, which had previously been administered to job applicants, was discontinued in about 1963 and the company initiated the use of the Wonderlic, A and B series, along with the Beta test. Since that time the two pre-employment tests, the Beta and

the Wonderlic, series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C. E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room (B Paper Mill), Power Plant Operator (Power Plant), Boiler Operator (Boiler Room), Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B Mill Product) lines of progression.

21. The Beta examination is a non-verbal test, developed during World War I to measure the intelligence of illiterate and non-English-speaking individuals.

22. The Wonderlic, series A and B, are short, verbal, widely-used intelligence tests. The explanation given for the use of these tests is that it was felt that it was essential for new employees to have certain verbal facilities because of the increasing technical nature of the mill operation. The cutoff score which was utilized for the Wonderlic, series A and B, is 18 on either test.

23. A high school education requirement was introduced in the early 1950's in response to a difficulty in finding qualified people for a modernized pulp mill. It was intended to assure a certain level of reading skill needed to comprehend the increasingly difficult material which accompanies technological innovations.

24. In December of 1964, Albemarle offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for jobs in other lines of progression and waived its high school education requirement for incumbent black employees who could successfully pass these tests. This offer was made a second time on November 4, 1965, and some Negro employees took the test and were transferred. However, a majority of those who took the tests failed them.

25. Employees who do not have a high school education and who are in jobs in lines of progression are not required to successfully pass the test battery in order to be considered for future promotions in that line of progression. The policy applies to similarly situated white and black employees.

26. Albemarle has waived the necessity of successfully passing the test battery for a few of the black employees who do not have a high school education. Similarly, exceptions to this practice have been made for white employees.

27. Apart from the standardized lines of progression, Albemarle maintains a maintenance staff which services and repairs machinery throughout the mill. The maintenance staff is not served by the call boards. In 1959 the company with the agreement of the Union established a formalized training program for maintenance employees called the Maintenance Apprenticeship Program. A high school education and passing test scores are required for entrance into the program. Three employees selected by the Union and three members selected by the maintenance superintendent periodically review the performance of apprentices and recommend promotion or demotion within the program to the maintenance superintendent. The maintenance program is not divided into functional craft divisions. Thus, all employees in the program must qualify to acquire the skills of a machinist, welder, carpenter, electrician, painter, oiler, pipefitter, rigger, millwright and insulator during the apprenticeship program.

28. In 1964, prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. In addition, the company solicited applications from black employees working in other departments in the mill. The first black employee entered the program in 1964. There were five

blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program. All had successfully met the high school and test qualifications for entrance.

29. After the Supreme Court decision in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), Albemarle again conducted validation studies of its testing and educational requirements. The company employed an expert in the field of industrial psychology and testing to conduct the studies. This expert utilized two manuals which outlined generally-accepted procedures for determining criterion-related validity: "Guidelines of Employee Selection, Procedures", Equal Employment Opportunity Commission, August 1, 1970, and "Standards for Educational and Psychological Tests and Manuals", published by the American Psychological Association.

30. In a study done on the testing requirements of Albemarle, the expert applied the "concurrent validation" technique to ten specific skill-related job groupings or lines of progression. An attempt was made to include in the sample all of the employees within the designated job groups. Two black employees refused to participate in the study, leaving only four blacks in the selected sample. Given this sample size, it was technically infeasible to validate the tests on a biracial basis.

31. Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit.

32. Each rated employee took, or had already taken, three tests—the Wonderlic Form A and Form B and the Beta Examination. The test scores were recorded for each individual. The tests were administered under controlled conditions by a trained personnel employee who had four years of experience in administering these particular tests.

33. The sample group rated and tested consisted only of present employees. The group tested was typical of employees in the skilled lines of progression. They were selected from the top and the middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested.

34. The data obtained from the ratings and the data obtained from the test scores were mailed to Purdue University where statistical correlation was performed. The expert correlated the job performance ratings and the test scores using the "Phi coefficient" formula to determine whether successful performance on the test was related to successful performance on the job.

35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings. More particularly, the study revealed that eight of the ten units correlated positively on at least one of the tests in a manner which could have occurred only by chance only once in a hundred times. One unit correlated positively in a manner that could have occurred only once in twenty times.

36. The conclusion of the validation studies was that "inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring

and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line".

37. In addition to the validation studies that he performed on the aptitude tests, the defendants' expert undertook a specialized study to determine whether the company's high school requirement bore a significant relation to the jobs for which it was a prerequisite. Since the high school requirement was instituted in the hope of improving the reading levels of new employees, the expert designed a study to focus on this variable.

38. The EEOC Testing Guidelines provide that "appropriate validation strategies" may be substituted for a criterion-related validity study where the latter is not technically feasible. Under these circumstances, strategies to measure "content" relationships are permitted. In the case of the high school requirement, neither of the two principal criterion-related methodologies were feasible. A "concurrent validation" study was not feasible because present employees did not constitute a statistically fair sample of high school graduates and non-high school graduates. Similarly, a "predictive validation" study was not feasible because that method, by its nature, would require the indiscriminate hiring of high school and non-high school control groups, measuring their performance over an extended period of time, then correlating the data. The company's expert designed a strategy to measure the verbal skills and aptitude needed to comprehend reading material and other "content" which is integral to successful performance on jobs in the skilled lines of progression. For the first phase of this text a professionally-developed formula, the "Flesch Readability Index", was used to measure the reading difficulty of standard Operating Manuals used in the skilled lines of progression at the Roanoke Rapids

mill. These manuals contain information relating to the operation of sophisticated machinery. The sample manuals used in the study were chosen by normal "random selection" from a file containing all of the reading material used in the skilled lines. The second phase of the technique employed merely required the expression of the "Flesch Count" in terms of the relevant criterion to be validated—in this case grades of education.

39. The "Flesch Index", which measures the difficulty of "content" based on syllable/word and word/sentence ratios, revealed that the reading difficulty of the Operating Manuals was such as to require the reading level of a high school graduate with perhaps some college. The expert concluded from his study that an individual must read at least at the level of a normal high school graduate to read the manuals.

40. The Operating Manuals contain information, the knowledge of which is required for the safe and efficient use of the machines and chemicals in the plant.

41. Some industrial psychologists believe that the average scores obtained by blacks as a group on written tests are lower than the average scores obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to whites, and in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for blacks but also for Mexicans, Puerto Ricans and whites of a lower income group. Although psychologists have made and are making an effort to construct cultural-free tests, these efforts, in the opinion of some psychologists, have not been successful so far.

42. A personal tour of the defendants' plant in company with counsel for plaintiffs and defendants served to convince the court that much of the machinery now in use is of a highly sophisticated and technically complex nature. Computers are used extensively throughout the production process as well as in the record-keeping, billing, shipping, purchasing and accounting operations. The efficient maintenance and operation of this machinery and electronic equipment obviously requires employees with a high level of native intelligence, prolonged training and experience.

CONCLUSIONS OF LAW

1. This court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The corporate defendants are employers in an industry affecting interstate commerce within the meaning of section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

3. The defendant Local 425 is an organization engaged in an industry affecting commerce within the meaning of Section 701(d), (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (d), (e).

4. Pla...tiffs have complied with the procedural requirements of Sections 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d) and (e).

5. Section 703(a) of Title 7, 42 U.S.C. § 2000e-2(a), prohibits an employer from discriminating against an employee "with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race . . .", or from limiting, segregating or classifying an employee "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-

cause of such individual's race". Subsection (c) of the same section defines as unlawful employment practices similar acts when done by a labor union. Subsection (h) provides that

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race . . .* nor shall it be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . .*" (Emphasis added.)

6. The Act does not provide redress for discriminatory employment practices occurring prior to July 2, 1965, the effective date of the Act. However, employment practices which tend to perpetuate past discriminations are unlawful, unless there is an overriding legitimate, non-racial business necessity. *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *Robinson* v. *Lorillard*, 444 F.2d 791 (4th Cir. 1971). And Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g), provides for equitable relief only if the court finds that a defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice". This provision has been interpreted to require only that the defendant "meant to do what he did, that is, his employment practice was not accidental". See *Robinson, supra*, at 796 (quoting from *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d at 966). Viewed in this light, it is clear that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965; that the effects of this discrimination has been perpetuated; and that such employment practices are unlawful under Title VII of the Civil Rights Act of 1964.

7. It is undisputed that prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Negro employees were traditionally assigned to the lower paying lines of progression. Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher-paying lines of progression. It follows that these practices must be enjoined in toto unless they have been shown to be "necessary to the safe and efficient operation of the business". *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 249 (10th Cir. 1970), cited with approval in *Robinson, supra.*

8. This court has found as a fact that the efficient maintenance and operation of Albemarle's machinery requires a certain degree of training and experience. However, a system of promotion and demotion based upon *job seniority*, unrelated to the minimum tenure required to gain the necessary proficiency in that job classification, is arbitrary and, when viewed in the context of past discriminatory practices, constitutes an unlawful employment practice. A system of promotion and demotion based on *plant* seniority would accomplish the purpose of awarding faithful employees, and a job residency requirement, based upon the minimum tenure required to gain the skill and proficiency of a given job classification, would insure the safe and efficient operation of the plant and the promotion of black employees relatively unhindered by past overt acts of employer discrimination. See *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *Long* v. *Georgia Kraft Company*, 2 F.E.P. Cases 658 (N.D.Ga. 1970).

9. This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for job classifications.

10. In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court "*may* . . . order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay*". The statute thus speaks clearly in terms of the discretionary power of the court. See *Local 186, International Pulp, Sulphite and Paper Mill Workers* v. *Minnesota Mining and Manufacturing Company*, 304 F.Supp. 1284 (N.D.Ind. 1969). *Robinson*, supra, can be read to hold that back pay is a compensation for a tangible economic loss and that the plaintiff class is *entitled* to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion *to award* back pay. It did not address itself to the clear statutory language of Section 706(g).

In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpreta-

tions of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in *Robinson*, supra, the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albemarle has consistenty paid higher wages at all levels of employment than thoes paid by other industries in the area—doubtless a reflection of the sophistication of the industry.

In addition, an award of back pay is equitable remedy. *Robinson*, 444 F.2d at 802, supra. The plaintiff's claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. See *Rental Development Corporation of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962), cited with approval in *Robinson*, supra.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is now

ORDERED, ADJUDGED AND DECREED

I. Albermarle Paper Company (Delaware) and Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, their officers, agents, employees and servants and all persons in active concert or patricipation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Albemarle Paper Company (Delaware) at its paper mill in Roanoke Rapids, North Carolina, in violation of Title VII of the Civil Rights Act of 1964.

A. In particular, the defendants are ordered to abolish the existing seniority system based substantially on job seniority and to refrain from negotiating or implementing any other seniority system designed to discriminate or having the effect of discriminating against Negroe employees, insofar as such systems may apply to permanent job assisgnments, and permanent promotions and layoffs of employees in the affected class, in competition with other employees at the Roanoke Rapids paper mill of Albemarle Paper Company (Delaware).

B. In place of the seniority system so abolished, the defendants are ordered to implement and permanently continue a system of plant seniority with respect to permanent job assignments and permanent promotions and layoffs of employees in the affected class, so that in making permanent promotions or demotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are relatively equal, plant seniority rather than job seniority shall govern. Albemarle Paper Company (Delaware) shall not discriminate on the basis of race in making any temporary assignments, promotions, layoffs or demotions at its Roanoke Rapids plant.

C. Plant or mill seniority shall be determined as length of continuous service from most recent date of permanent employment.

D. Qualifications as used immediately above and elsewhere in this decree shall be deemed to refer to (1) ability and fitness, (2) knowledge and training, and (3) experience and skill developed during an employee's tenure at the mill. Where a member of the affected class with higher plant seniority competes for a job with a non-member having lower plant seniority, the latter shall not be deemed more qualified for promotion simply because of ability,

fitness, knowledge, training, experience or skill which are the product of his longer tenure in job slots immediately below the vacancy, subject, however, to the use of reasonable residency requirements in job slots within lines of progression as set forth in Appendix A to this decree. The residency requirements of Appendix A are subject to amendment if the parties, within thirty days, submit additional evidence or stipulations bearing on the minimum on-the-job training requirements for safety and proficiency in a given job classification.

E. In making permanent promotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, the lowest paying job in each line of progression shall be the proper job for beginning in the line, and proper progression shall be the proper job for beginning in the line, and proper progression shall be to the job next higher than that currently held by the employee.

F. Normal seniority provisions, without the modifications of this decree, shall prevail in making permanent promotions or demotions:

1. When employees not of the affected class compete with each other, such as when no employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees not of the affected class who have longer company service than an affected class employee in the job classification from which the promotion or demotion is to be made;

2. When employees of the affected class compete with each other, such as when all employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees of the affected class who have longer company service than an employee who is not of the affected class

in the job classification from which the promotion or demotion is to be made.

G. Employees who are transferred from one line of progression to another shall carry their seniority and wage rate as provided in Section 10.2.2 and 10.2.3 of the current Labor Agreement, except that in no event shall the rate retention right or "Red Circle" rate exceed $3.36 per hour (straight time). The "Red Circle" protection provided in this paragraph shall apply to only one transfer made pursuant to this decree.

H. Defendants are directed to amend the seniority provisions of Section 10 of the Labor Agreement to provide for the posting of all permanent vacancies to entry level jobs in the various lines of progression as contained in Appendix A. Such posting shall be for three (3) calendar days on the clock house bulletin board.

I. The defendants are permanently enjoined and restrained from requiring a high school education as a prerequisite for employment, promotion or transfer.

II. The defendants are directed to amend the Labor Agreement to include provisions for assignments from the Call Board incorporating the following terms:

A. Immediately after a determination has been made of available job assignments, and prior to any assignments being made, employees meeting the shift who have recall rights to any job listed must indicate to the clock room attendant whether or not they wish to exercise such recall rights.

B. Thereafter the senior qualified employee meeting the shift in terms of plant or mill seniority will be given the choice of all the then available jobs. Succeeding offers will be made to those meeting the shift in order of their decreasing mill seniority.

C. Requests coming in after posting of the lists and the start of assignments shall be immediately made available to those meeting the shift who have not already received assignments.

III. The request for abolition of or changes in testing procedures is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

IV. The request for an award of back pay is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

V. Counsel for the parties are directed to confer among themselves in an effort to reach an agreement on reasonable attorneys' fees for plaintiffs' counsel and the apportionment thereof among the defendants. They shall report to the court within thirty days of the entry of this decree whether they have been able to reach an agreement, and if not the court will then determine the amount of fees and their apportionment.

IT IS SO ORDERED.

This 9th day of November, 1971.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

[APPENDIX A]

Method for Calculating Residency Requirements

When calculating time spent on a particular job for purposes of determining when the residency requirement has been satisfied, the following will be counted toward satisfaction of the residency requirement of a particular job classification:

1. Time worked while permanently assigned to the job in question.

2. Time worked while permanently assigned to a job below the job in question but assigned on a temporary basis to the job in question, provided such temporary time on the job equals or exceeds 48 hours in any calendar month, in which case all such temporary time in that month will be counted. In the event that temporary time on a particular job does not amount to 48 hours in one calendar month, all such temporary time in that month will be counted toward satisfying the residency requirement of the job to which the employee is then permanently assigned.

Time worked on either a permanent or temporary basis as defined above shall satisfy residency requirements as follows:

1. 172 hours actually worked shall satisfy one month of residency.

2. 40 hours actually worked shall satisfy one week of residency.

APPENDIX A

Residency Requirements

Wood Yard Department

Crane Operator (American)	
Crane Operator (Large)	11 months
Long Log Operator	9 months
Log Stacker Operator	8 months
Small Equipment Operator	8 months
Bulldozer Operator	6 months
Oiler	6 months
Chip Unloader	3 months
Chipper Operator No. 2	3 months
Chain Operator	3 months
Chipper Operator No. 1	3 months
Tractor Operator	3 months
Chip Bin Operator	3 months
Laborer	1 month

Pulp Mill Department

Digester Operator (Cooker)	
Stock Room Operator	12 months
Stock Room First Helper	12 months
Stock Room Second Helper	6 months
C. E. Recovery Operator	
1st Helper No. 6	15 months
Evaporator Operator (when used)	12 months
1st Helper No. 5	12 months
2nd Helper	9 months
Utility Helper	4 months
Caustic Operator	
Lime Kiln Operator	12 months
By Products Operator	
Leadloader—Blower	9 months
Loader	6 months

Power Plant

Power Plant Operator	
1st Helper	18 months
2nd Helper	12 months

B Mill Shipping

Scale Clerk	
Lift Truck Operator	12 months
Utility Man	9 months
Laborer	3 months

Boiler Room Department

Boiler Operator	
Bark Burner Operator	10 months
1st Fireman	9 months
2nd Fireman	6 months
Laborer	3 months

B Paper Mill Department
Paper Machine Progression

Machine Tender	
Back Tender	36 months
3rd Hand	24 months
4th Hand	12 months
5th Hand	4 months
6th Hand	2 months
7th Hand	1 month

Stock Room Progression

Stock Room Operator	
Stock Room 1st Helper	12 months
Stock Room 2nd Helper	6 months

Technical Services
Mill Progression

B Mill Shift Testman	
Additive Man	15 months

Laboratory

General Lab Testman	
General Lab Assistant	15 months
Sampleman	6 months
Trainee	3 months

Service Department

Payloader	
Dempster-Dumpster Operator	10 months
Winch Truck Operator	9 months
Truck Operator	9 months
Winch Truck Operator Helper	3 months
Laborer	1 month

Store Room Department

Storeroom Clerk A	
Storeroom Clerk B	6 months
Storeroom Clerk C	6 months
Storeroom Clerk D	6 months

A Paper Mill Department
Paper Machine

Machine Tender No. 1	
Machine Tender No. 2	30 months
Back Tender No. 1	26 months
Back Tender No. 2	26 months
Third Hand No. 1	24 months
Third Hand No. 2	24 months
Fourth Hand No. 1	12 months

Fourth Hand No. 2	12 months
Front Plugger No. 1	4 months
Back Plugger No. 1	4 months
Back Plugger No. 2	3 months

A Paper Mill Department
Beater Room

Beaterman	
1st Helper	12 months
Brokeman	6 months

Shipping Room Department A Mill

Lead Loader	
Lift Truck Operator	12 months
Lead Tier and Wrapper	6 months
Wrapper Loader, Laborer	3 months

Filed Feb. 20, 1973

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL and ARTHUR MITCHELL, *Appellants*,

v.

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees*.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*.

Appeal from the United States District Court for the Eastern District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D

Filed Sepptember 13, 1974

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, and ARTHUR MITCHELL, *Appellants,*

v.

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL No. 425, United Papermakers and Paperworkers, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

Upon motions of the appellees, by their counsel and for cause shown,

IT IS ORDERED that the judgment in lieu of the mandate be, and the same is hereby, recalled; that the Clerk of the United States District Court for the Eastern District of North Carolina, at Raleigh, is directed to return to the Clerk of this Court the certified copy of the judgment issued in lieu of the mandate; and that the mandate be stayed for a period not to exceed thirty (30) days, pend-

ing application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court—by direction.

WILLIAM K. SLATE, II
Clerk

(Seal) MC

A True Copy, Teste:
William K. Slate, II, Clerk

By VIRGINIA LIPFORD
Deputy Clerk

APPENDIX E

Filed June 22, 1974

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, and ARTHUR MITCHELL, *Appellants,*

v.

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL No. 425, United Papermakers and Paperworkers, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees.*

Order

It appearing from the decision of the Supreme Court in Moody v. Albemarle Paper Co., — U.S. —, 42 L.W. 3689

(June 17, 1974) (per curiam), that the order heretofore entered on June 25, 1973, setting this case for rehearing in banc, was improvidently entered, in that only active circuit judges were entitled to vote in the poll on the suggestion for rehearing in banc and a majority of the active circuit judges voted against rehearing in banc;

Accordingly, it is ORDERED that said order of June 25, 1973 be, and it is hereby, rescinded, and the petitions for rehearing and rehearing in banc be, and they are hereby, denied.

CLEMENT L. HAYNSWORTH, JR.
Chief Judge

A True Copy, Teste:
William K. Slate, II, Clerk

By FAYE CHLORIE
Deputy Clerk

APPENDIX F

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

such individual's race, color, religion, sex, or national origin.

* * * * * * * * * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * * * * * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *

* * * * * * * * * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. * * *

* * * * * * * * * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

* * * * * * * * * *

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than

sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).

• • • • • • • • • • •

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

• • • • • • • • • • •

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

• • • • • • • • • • •

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, AND ARTHUR MITCHELL, *Appellants,*

v.

ALBEMARLE PAPER COMPANY, a Virginia corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, AND HALIFAX LOCAL No. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware corporation, HOERNER WALDORF CORPORATION, a Delaware corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia corporation, *Appellees.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae.*

No. 73-1479

BAXTER K. WILLIAMS, ALBEMARLE EMPLOYMENT COORDINATING COMMUNITY DEVELOPMENT ASSOCIATION, an unincorporated association, and the North Carolina Teachers Association, a corporation, *Appellees,*

v.

THE ALBEMARLE CITY BOARD OF EDUCATION, a public body corporate, Appellant.

Certificate

The Judges of the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28

U.S.C. § 1254(3), respectfully certify the following question to The Supreme Court of the United States:

Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?

The question is of determinative importance in each of the cases.

In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision wiht respect to an award of back pay.

In *Williams*, one senior circuit judge was a member of the initial hearing panel. Upon a suggestion of a rehearing *en banc*, he is opposed. A majority of the judges in regular active service is in favor of an *en banc* rehearing, but if the vote of the senior circuit judge is counted, the suggestion will fail by an equal division of the judges. No formal order has been entered on the petition for rehearing with a suggestion for rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose. The panel has reversed an award of damages by the district court, but if the voting on the petition for rehearing is an accurate prediction, the *en banc* court, if it reaches the merits of the appeal,

probably would affirm the district court by an equally divided court.

In the Court of Appeals for the Fourth Circuit, the custom has been to count the votes of senior circuit judges who were members of the initial hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule, and a look at *Zahn* v. *International Paper Co.*, 2 Cir., 469 F.2d 1033, 1040-32, and *Allen* v. *Johnson*, 5 Cir., 391 F.2d 527, 532.

Were the answer to the question in each case of importance to the litigants only, the Judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it, though in *Williams* v. *Albemarle City Board of Education*, there is a possibility of an equal division of the court. The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake.

The execution of this Certificate has been authorized by the two senior circuit judges and by all of the judges in regular active service.

/s/ CLEMENT F. HAYNESWORTH, JR.
Clement F. Haynesworth, Jr.
Chief Judge,
Fourth Circuit